IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

FAMILY COURT APPEAL NO. 8 OF 2001
WITH
FAMILY COURT APPEAL NO. 9 OF 2001

Shri Kamalakar Ganesh Sambhus
Age 49 years, Occ. Profession,
Residing at 403, Guruwar Peth,
Pune- 411 042. ... Appellant
Org.Petitioner.

Vs.

Master Tejas Kamalakar Sambhus
Age 14 years, Occ. Education.
Residing at - Lake Villa Housing Society,
Sutarwadi, Pashan, Pune-45.
(being minor represented by his natural
mother as a guardian)
Sou. Suvarna Kamalakar Sambhus,
Age 47 Occ. Service.
Residing at -Lake Villa HOusing Soecity,
Sutarwadi, Pashan, Pune-45. ..Respondent
Og.Respondent.

Shri A.V. Anturkar for the appellant.
Shri S.N. Chandrachud for the respondent.

CORAM : F.I. REBELLO &

ANOOP V.MOHTA, JJ.

DATE : 17TH AUGUST, 2004.

ORAL JUDGMENT (PER F.I. REBELLO, J.)

. The appellant herein was the petitioner in petition No. 408/1995, which was filed under Section 13(1)(ia) of the Hindu Marriage Act. That petition came to be allowed and the marriage between the appellant

Kamalakar and respondent Suvarna stood dissolved with effect from the date of the order. Mrs. Suvarna has not challlenged the order of divorce. A further direction was given, that the appellant and respondent are the joint owners of the house property situated at Lake Villa, Shree Siddhatek Co-Op Housing Society,Sutarwadi, Pashan Pune and the respondent's share in the title of the property was determined to be half share. It was further directed that both the appellant and respondent's have right of possession over the house property to the extent of half share and in the event of sale of the house property, the petitioner and respondent will be entitled to receive half of the sale proceeds. The parties were also directed to pay equally the liability of property taxes and other outgoing charges of the house property. The Family Court Appeal No.8/2001 is limited to the part of order passed in petition No. 408/1995.

2. The minor son Tejas Kamalakar had filed petition bearing No. 8/1997, that was also allowed with the direction that the appellant shall pay Rs. 1000/- per month to his son, till he attains the age of majority from the date of the petition. A charge was created on

the house property for the amount of maintenance. Family Court Appeal No. 9/2001 is against that order. That appeal came to be dismissed by the order of Division Bench dated 7th February, 2001.

3. At the hearing of this appeal on behalf of the appellant, their learned Counsel contends that considering section 27 of the Hindu Marriage Act, 1955 the learned Family Court could not have passed an order regarding the house property and consequently the order should be set aside and the appeal allowed. Section 27 of the Hindu Marriage Act reads as under;

> " In any proceeding under this Act, the Court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage. which may belong jointly to both the husband and the wife."

. From a reading of the said section learned Counsel points out that it will be clear that it is only property presented on or about the time of the marriage and which belongs jointly to both the husband and wife which can be the subject matter of an order under Section 27. The property which the husband and wife may acquire during the subsistence of the marriage out of

their own efforts and not presented would not fall under Section 27. That property can at the highest be the subject matter of other proceeding which in law parties may be entitled to proceed with, but not under Section 27 of the Hindu Marriage Act, 1955. It is therefore, pointed out the Family Court in proceeding under the Hindu Marriage Act would not have jurisdiction to decide about such other property. It is pointed out that no doubt a Division Bench of this Court in (Sangeeta V. Balkrishna Kadam) 1994 MH.L.J. 230 had taken a view that considering Section 151 of the Code of Civil Procedure though ornaments and property which was not presented to the wife at the time of marriage would not be covered by Section 27, yet the court would have jurisdiction under Section 151 of Code of Civil Procedure to pass order.

4. We are not called upon to decide the correctness of the view taken by another co-ordinate Bench of this Court, considering that the said judgment came up for consideration before the Apex Court in Balkrishna Ramchandra Kadam V. Sangeeta Balkrishna Kadam (1997) 7 Supreme Court 500. The Apex Court considered the meaning of the expression "property presented on or

about the time of marriage". After considering the expression, the Apex Court observed as under;

> "The expression "at or about the time of marriage" has to be properly construed to include such property which is given at the time of marriage as also the property given before or after marriage to the parties to become their "joint property", implying thereby that the property can be traced to have connection with the marriage. All such property is covered by Section 27 of the Act."

. It will be thus clear from reading the said observation of the Apex Court that property not given to the couple to be held as their joint property cannot be the subject matter of an order under Section 27. Therefore, property acquired by the couple by their own efforts and not given to them at or about the time of marriage to be held jointly, would not be property covered by Section 27 of the Act.

. Further considering the judgment of Division Bench of this Court,the Apex Court was pleased to further observe as under;

> "Whereas the Division Bench was right in holding that an order under Section 27 of the Act could be made by the trial Court while dealing with matrimonial proceedings to form a part of the decree in the matrimonial proceedings, but no decree with regard to the property could be made

> unless it was established by evidence that the property was covered by Section 27 of the Hindu Marriage Act."

From the above it becomes clear that to pass an order under Section 27 the requirement is (1) that property must have been was presented at or about the time of marriage and (2)To become their joint property.

. It is only on these two predicates being satisfied that the Court may proceed to pass an order under Section 27. Considering the judgment of the Apex Court it is not necessary to deal with the other judgments the cited, named Kamta Prasad V. Smt. Om Wati A.I.R. 1972 Allahabad 153, Smt. Shukla V. Brij Bhushan Makkar A.I.R. 1982 Delhi 223, Aruna Madan V. Subhash Madan I (1994) DMC 59, as also of the Division Bench Judgment of Calcullta High Court in Bijoy Krishna Ghosal V. Namita Ghosal nee Ganguly A.I.R. 1991 Calcutta 34 which has taken the view that even after the disposal of the proceeding it was still open to the Court on an application under Section 27 to pass a decree in respect of the property covered by Section 27. This view of Division Bench finds support in the Judgment of the Apex Court taken in Balkrishana Kadam

(Supra). We are not called upon to decide that issue.

5. Considering the law as stated above we may now consider the facts in issue. The issues framed in respect of the property were as under;

" Does respondent-wife prove that she had major contribution in construction of the house property?

" Is respondent entitled for declaration of her title or in the alternative a share in the house property?"

While answering issue No.5 the learned Family Court held that the respondent wife had proved that she had made contribution to the extent of half share in the construction of house property. Issue No.6 was answered in the negative. It is therefore, clear from the finding recorded by the trial Court, that this was not property given to the appellant and or respondent at or about the time of marriage and to be held jointly but this was property acaquired during the subsistence of the marriage by the efforts of the appellant and respondent. Considering that the requirements of Section 27 are not satisfied. Once that is the case,

the order of the Family Court granting the relief in terms of direction NO.3 being without jurisdiction, will have to be set aside.

6. In the light of that the following order;

. Appeal allowed. The Judgment and Decree of the Family Court, dated 17th August 1999 in Petition NO. 408/1995 is partly allowed and direction No.3 in the said order is set aside. In the circumstances of the case there shall no order as to costs.

. Parties concerned to act on a simple copy of this order, duly authenticated by the Court Stenographer of this Court.

[F.I. REBELLO, J.]

[ANOOP V. MOHTA, J.]